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No. 89-333 (18)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AMERICAN PAPER INSTITUTE, NATIONAL HYDROPOWER ASSOCIATION, PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, AND PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Edison Electric Institute ("EEI"), American Public Power Association ("APPA"), National Rural Electric Cooperative Association ("NRECA"), American Paper Institute ("API"), National Hydropower Association ("NHA"), Public Utility District No. 1 of Chelan County, Washington, Public Utility District No. 1 of Douglas County, Washington and Public Utility District No. 2 of Grant County, Washington ("Industry Amici"), submit this brief *amici curiae* in support of respondents Federal Energy Regulatory Commission ("Commission") and Rock Creek Limited Partnership ("Rock Creek").[1]

EEI, APPA and NRECA are the national trade associations of the investor-owned, publicly owned, and cooperatively owned segments, respectively, of the Nation's electric utility industry. Their members hold a large majority of the more than 1000 hydroelectric project licenses issued by the Commission in 48 states. API is the national trade association for the pulp, paper, and paperboard manufacturers of the United States and a number of its members hold hydroelectric project licenses. NHA's members include owners and developers of hydroelectric projects from all regions of the Nation and all segments of the industry, as well as equipment manufacturers and engineering, legal, financial and consulting firms. The public utility districts are municipal corporations of the State of Washington providing electric service to the public and holding Commission licenses for their hydroelectric projects.

The importance to the Nation's energy base of the power generated by the projects licensed and to be licensed in the future has been recently detailed by the

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[1] The letters from the Solicitor General, Rock Creek, and the State of California consenting to the filing of this brief have been filed with the Clerk of the Court.

Commission.[2] As both current and potential licensees, Industry Amici have a vital interest in the issue before the Court.

INTRODUCTION

In the Federal Water Power Act of 1920 [3] Congress ended several decades of piecemeal hydroelectric power development on federal lands and water subject to federal jurisdiction by vesting in the Federal Power Commission (now the Federal Energy Regulatory Commission, both hereafter "Commission") the exclusive authority to license projects which it determined were "best adapted to a comprehensive scheme for improvement and utilization" of a river basin for navigation, water power development and other beneficial public uses.[4] In response to concerns expressed primarily by the western states, Congress expressly disclaimed in section 27 any intent "to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein".[5] In section 9(b) it also directed license applicants to present to the Commission "satisfactory evidence [of compliance] with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes. . .".[6]

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[2] FERC, *Water Power-Use of Renewable Resources* (May 1988); FERC, *Hydroelectric Power Resources of the United States—Developed and Undeveloped* (GPO, 1988).

[3] 41 Stat. 1063, later incorporated into the Federal Power Act in 1935, 49 Stat. 838, 16 U.S.C. §§ 791 *et seq.*, hereafter sometimes the "Water Power Act" or "the Act".

[4] 41 Stat. 1068 (§ 10(a)).

[5] *Id.* at 1077, 16 U.S.C. § 821.

[6] *Id.* at 1068, 16 U.S.C. § 802(b).

This Court first interpreted these two provisions in 1946 in a controversy involving the refusal of the Commission, consistent with its previous administrative construction of those sections,[7] to issue a license to an applicant who had failed to obtain a permit from the State of Iowa to divert water for the same project. In *First Iowa Hydroelectric Coop. v. FPC*, 328 U.S. 152 ("*First Iowa*"), the Court held that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181. In reaching that decision it rejected Iowa's contention that section 27 required a contrary result. *Id.* at 175-76.

For 44 years judicial decisions, including many by this Court,[8] have recognized the continuing validity of *First Iowa's* holding that the Act occupied the field and superseded state laws that purport to control the acquisition of water rights for, and the operations of hydroelectric power projects licensed under the Act. In the present case, California and its supporting states ("Amici States") seek to overturn *First Iowa's* longstanding interpretation of section 27. They rely solely on this Court's interpretation of the similar, but significantly different, language of section 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. §§ 372, 378) in *California v. United States*, 438 U.S. 645 (1978) ("*California*"). For the reasons detailed below, Industry Amici contend that (1) *First Iowa* was rightly decided, (2) it

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[7] Calif. Br. 35, n. 17.

[8] *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *FPC v. Oregon*, 349 U.S. 435 (1955); *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958); *Sperry v. Florida*, 373 U.S. 379, 385 n. 4 (1963); *FPC v. Union Elec. Co.*, 381 U.S. 90, 98-99 (1965); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n. 6 (1982); *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 223 n. 34 (1983); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984).

was properly applied by the Ninth Circuit in this case, (3) *California* does not require a different result, and (4) the Ninth Circuit can also be sustained on an independent legal ground not decided below.

SUMMARY OF ARGUMENT

First Iowa correctly interpreted (1) the Federal Water Power Act as occupying the field of hydroelectric power development and (2) section 27 of that Act as protecting all water *rights*, including those for power generation, vested under state law and preserving all preexisting state *laws* relating to the allocation and use of water for other than hydroelectric power generation purposes, primarily irrigation, municipal and other similar consumptive uses. The Ninth Circuit properly applied *First Iowa* in rejecting California's attempt to impose flow conditions on Rock Creek's use of water for its Commission-licensed project.

Even if section 27 were construed as preserving state laws relating to hydroelectric power development so as to require a "conflict preemption" analysis on a case-by-case basis for over 1000 Commission-licensed projects, the Ninth Circuit's finding of an irreconcilable conflict between California's proposed flow conditions and the Commission-imposed conditions in the Rock Creek license should be affirmed.

Finally, the Ninth Circuit can also be affirmed on the independent legal ground that since the Rock Creek project is located on federal lands withdrawn by section 24 of the Act (16 U.S.C. § 818) for power generation purposes, state law is inapplicable and Rock Creek may utilize the federally reserved water right created by that withdrawal.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY FOLLOWED *FIRST IOWA'S* HOLDING THAT THE FEDERAL WATER POWER ACT EFFECTED AN OCCUPATION OF THE FIELD WITH RESPECT TO THE LICENSING AND CONTROL OF HYDROELECTRIC POWER DEVELOPMENT.

A. The Scope of the *First Iowa* Decision.

There is no dispute that *First Iowa* decided that the Act vested the Commission with *exclusive* licensing authority for hydroelectric projects within its jurisdiction. California's claim is that it nevertheless retains concurrent regulatory authority over a licensee with respect to the use of water in the licensed project operations, in this case the maintenance of minimum flows for fish protection. Furthermore, it contends that state requirements, even though inconsistent with Commission-established license conditions, must be honored unless they are in conflict with "clear congressional directives" in the Act. Calif. Br. 5. The basis for California's claim is section 27, *First Iowa's* interpretation of which California contends should be (1) noncontrolling because it was allegedly dictum and (2) overturned because it is allegedly wrong.

California's claim is erroneous on both counts. *First Iowa's* interpretation of section 27 was plainly necessary to sustain the Court's decision that the Act, when construed as a whole, conferred exclusive licensing authority on the Commission and left no room for the exercise of duplicative state regulatory authority, *i.e.*, that Congress intended to occupy the field of hydroelectric project licensing and regulation. The Court recognized, however, that the "savings" provisions of section 27 limited the Act's superseding effect and therefore required interpretation. Given California's vigorous argument that such an approach is the proper statutory analysis (Calif. Br. 11-12), its characterization of the *First Iowa* interpretation as "dictum" is, at the least, difficult to fathom.

In concluding that section 27 did not preserve from supersedure state laws relating to the use of water for hydroelectric power development purposes *First Iowa* read its scope as follows:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "*other uses.*" Those words, however, *are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.*
>
> • • • •
>
> This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the states, *Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.*

328 U.S. at 175-76 (emphasis added). Not only is that interpretation consistent with the comprehensive federal regulatory regime established by the Act and its detailed licensing provisions, but it is fully consistent with the Act's legislative history which, contrary to California's representations (Calif. Br. 39), was thoroughly considered by the Court.[9]

Despite citations to numerous excerpts from the legislative record of the Act from 1914-1920 (Calif. Br. 22-35), California offers no explanation as to why section 27, either in any of its early forms or as finally enacted,

[9] See Brief of Amici Modesto Irrigation District and Turlock Irrigation District.

failed to specify power generation as one of the water uses whose control under state authority was to be preserved from supersedure. Indeed, Rep. Mondell (Wyo.), who had authored section 8 of the Reclamation Act of 1902, recognized section 27's limited applicability:

> The only trouble about this provision is that it is not complete enough and far-reaching enough, and I shall offer an amendment to broaden its provisions. It is not as good a provision as that contained in the irrigation [Reclamation] law, which, by the way, I had the honor of drawing. It is not as broad and all-embracing a provision, but with a slight amendment, *including the word 'power,'* it will do very well.

51 Cong. Rec. 14070 (1914) (emphasis added). No such amendment was ever made, an omission that is particularly significant in light of the overriding focus of the Act on hydroelectric power production. Thus, California's assertion that "[o]n its face, section 27 plainly requires hydropower projects to comply with state water laws" (Calif. Br. 10) is plainly erroneous. State laws relating to power generation are only mentioned in section 9(b), but California does not ask the Court to overrule *First Iowa's* interpretation of the limited "informational" function served by that section.

Section 27 plainly speaks in the disjunctive, preserving both certain existing state *laws* in its first clause as well as certain "vested *rights*" in its second clause.[10] The latter clause was intended to protect *any* state created, preexisting vested water *rights*, including water rights for the generation of hydroelectric power, as this Court held in *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954). Our disagreement with California centers on

[10] "Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with [1] the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or [2] any vested right acquired therein." (Numbers added).

the kinds of state *laws* whose continued applicability was preserved by the first clause of section 27.[11] We do not disagree with the *First Iowa* conclusion that the kinds of state laws preserved by that clause are those conferring rights of a "proprietary" nature.[12] But California's contention that it encompassed *all* state laws relating to any kind of water use, including hydroelectric power generation, *i.e.*, that Congress intended for the Commission to regulate all aspects of licensing hydroelectric projects except for the use of water to run the projects, would mean that Congress labored mightily for six years to craft "comprehensive" licensing authority only to produce a toothless tiger.

1. *Consumptive Uses.*

The laws which Congress intended to preserve by section 27 were primarily those under which "consumptive use" rights could be acquired, *i.e.*, the consumption of water for such purposes as irrigation or municipal needs. Rep. Taylor (Colo.), author of the language ultimately enacted as section 27 (Calif. Br. 28), emphasized that the bill was designed to enable the Commission to grant "authority to create power *and utilize water* for power purposes", but that "if a party appropriates water . . . for *irrigation* under State law they will have that addi-

[11] *First Iowa's* discussion of section 27 (*supra* p. 6) is not without some ambiguity. For example, although the section speaks disjunctively of "laws" or "rights", the Court's language blurs that important distinction. The "rights" protected by the second clause do not appear to be tied only to the "laws" preserved in the first clause, which would arguably be the case if the second clause referred to "vested rights *thereunder*", as section 8 of the Reclamation Act does. See *infra* p. 20. Rather section 27 refers to "vested rights *therein*", which does not grammatically relate to "laws" in the first clause, but more appropriately to "water".

[12] Proprietary rights to the use of water for beneficial purposes, including hydroelectric power generation, are established by general property law or (in most of the western states and, more recently, eastern states as well) by regulatory permit systems. Ausness, *Water Rights Legislation in the East, a Program for Reform*, 24 Wm. & Mary L. Rev. 547 (1983).

tional *property right* in addition to the power privilege granted here." [13]

The recognition in *First Iowa* that the "other uses" in section 27 meant "uses of the same nature" (*supra* page 6) and did not include power generation is supported not only by its omission from section 27 as a specific illustrative use (as decried by Rep. Mondell, *supra* page 7), but by its special treatment under western water law at the time. Although power generation was then recognized as a beneficial use of water in most western states,[14] it was clearly not a "consumptive" use in the sense that it does not physically consume water, as irrigation and municipal uses do. Rather, water used for hydroelectric power generation simply flows through a generating plant's turbines and becomes available for other uses downstream. Consequently, it was generally treated differently than consumptive uses. This is illustrated by the Colorado River Compact of 1922,[15] negotiated only two years later, in which the representatives of the seven Colorado River Basin states (Arizona, California, Nevada, Utah, Colorado, New Mexico and Wyoming)[16] allocated the waters of that basin on the basis of "beneficial consumptive use". Art. III(a) and (b). The Compact also provided that the use of the waters of the basin for navigation would be subservient to their use for "domestic, agricultural and power pur-

[13] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 92 (1918) (emphasis added). Rep. Taylor later claimed credit for "getting section 27 put into this bill, which is the savings clause of our *irrigation* right." 56 Cong. Rec. 9115 (1918) (emphasis added).

[14] 1 Wiel, *Water Rights in the Western States* 410 (3rd ed. 1911).

[15] Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams*, H.R. Doc. No. 319, 90th Cong., 2d Sess. 53 (1968).

[16] The representatives of several of these states were instrumental in adding section 27 to the Act, *e.g.*, Reps. Mondell (Wyo.), Taylor (Colo.) and Raker (Calif.). Calif. Br. 23-35.

poses" and that within those three categories agricultural and domestic uses were to be "dominant". Art. IV. Domestic use was defined to "include the use of water for household, stock, *municipal*, mining, milling, industrial, and other like purposes, *but shall exclude the generation of electrical power.*" Art. II(h) (emphasis added).

Congress thus drew a line in the first clause of section 27 between state laws relating to traditional consumptive uses, which were "saved" from preemption, and state laws regulating the use of water by hydroelectric power projects within the Commission's jurisdiction,[17] which were to be wholly superseded.[18]

Amici States express concern that the Commission allegedly has sometimes exercised its exclusive authority to license projects for hydroelectric generation in a manner

[17] There is no indication that Congress intended to supersede state laws relating to the use of water for (1) steam electric generation, *FPC v. Union Elec. Co.*, 381 U.S. 90, 109-110 (1965), or (2) hydroelectric generating plants using waters not subject to Congress' commerce power.

[18] In *Udall v. FPC*, 387 U.S. 428 (1967), this Court, speaking through Justice Douglas, an ardent champion of "states rights" in the water field, suggested that "[a] *license* under the Act *empowers the licensee* to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, *in effect, to appropriate water resources from the public domain.*" *Id.* at 450 (emphasis added). Similarly, in *Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78 (D.C. Cir. 1983), the court stated that "it is plain that when FERC grants a license without appropriate reservation, FERC *does* undertake not to license other projects that will substantially alter the supply of water to the prior licensee without its consent." *Id.* at 87, n. 19 (emphasis in original). The lack of clear judicial explication of a licensee's source of water use authority probably explains in part why most licensees have continued to seek state water permits in order to protect themselves, at least where they were available without conditions in conflict with their license. Such action at least serves as notice to the state that the licensee has federal authorization to use water for the purposes and in the manner specified in its license, thus aiding the state in the administration of other water rights on the stream.

which they say intrudes on the rights saved to the states by the first clause of section 27 with respect to consumptive uses of water. States' Br. 25-27. Although the issue of whether the Commission has exceeded its jurisdiction is not before the Court, Congress obviously intended that the Commission and the states would confine their regulatory actions to their respective jurisdictional spheres with due regard to the line Congress drew between them. Industry Amici are not aware that the Commission has attempted directly to allocate water for consumptive use purposes, although it has issued a license requiring the applicant to accept minimum flow conditions that could ultimately curtail the licensee's irrigation water rights acquired under California law, an exercise of licensing "leverage" that was sustained in *California v. FPC*, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965).

2. *Instream Values.*

Similarly, in 1920 state law, particularly in the western states whose spokesmen championed section 27, did not provide mechanisms for the acquisition of "proprietary" rights to the use of water for instream values such as fish and wildlife, recreation and aesthetics, nor did the states exercise "regulatory" authority for such purposes.[19] As late as 1973, the National Water Commission highlighted the historic deficiencies of state law in this area as follows: [20]

[19] There is no mention of such uses in Wiel, n.14 *supra*, the classic text on western water law systems at the time. See Shupe, *Keeping the Waters Flowing: Stream Flow Protection Programs, Strategies and Issues in the West* in MacDonnell, Rice and Shupe, *Instream Flow Protection in the West*, Ch. 1 (Univ. of Colo. 1989) for a history of state action in the field.

[20] National Water Commission, *Water Policies For The Future* 271 (GPO 1973). National environmental organizations, including some who support California in this case, believe that many states still do not provide appropriate legal recognition for such values and are currently urging Congress to either (1) remain silent with respect to water rights for designated wilderness areas with

> State laws creating and protecting rights to the use and enjoyment of water fail to give adequate recognition to social (that is, noneconomic) values in water. This omission derives in the West from the law of appropriation, which embodied the social preference during the period of its formulation for economic development over protection of such social values as esthetics, recreation, and fish and wildlife propagation. In the East, where the law of riparian rights prevails, some greater protection of these values is possible since riparian landowners are entitled to a reasonable streamflow in competition with those who would divert the stream to economic uses. But even in the East, the protection of social values lies in the hands of private citizens and not with public authorities, for riparian rights are private rights, not public rights.

Consequently, whatever authority the states possessed with respect to the creation of property rights to the consumptive use of water in 1920, and which was preserved by section 27, cannot be expanded to encompass relatively recent state regulation of water rights for fish and other instream values, which is what California seeks here.

Congress filled that gap in 1920 when it authorized and directed the Commission only to license projects that "in the judgment of the Commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water power development, and for *other beneficial public uses*" [21], uses in which this Court has observed "the Federal Government had a legitimate interest [and] which, while un-

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the hope that the courts will "imply" a federal reserved water right for such areas, or (2) expressly reserve unappropriated water for such purposes. *See e.g., Hearings before the Subcommittee on Public Lands of the House Commitee on Interior and Insular Affairs on H.R. 34 and H.R. 4233*, 99th Cong., 2d Sess. 111-16, 339-49 (1986) (Sierra Club); *Hearings before the Subcommittee on Public Lands, Nat'l Parks and Forests of the Senate Energy and Natural Resources Committee on S. 371*, 101st Cong., 1st Sess. 90-103 (1989) (Wilderness Society).

[21] 41 Stat. 1068 (§ 10(a)) (emphasis added).

regulated, might well be contradictory rather than harmonious." [22] This mandate for "comprehensive" utilization of water for beneficial purposes has proven broad enough to cover instream values impacted by hydroelectric projects, and the Commission has exercised its licensing authority to balance the uses of the land and water resources of a river basin affected by such projects with other beneficial public uses of those same resources.[23] The Commission was actively using its license conditioning power to protect and promote fish habitat and other instream values no later than the 1940's.[24] Nor did the Commission hesitate, well before Congress created the Wild and Scenic Rivers System in 1968 (16 U.S.C. §§ 1271 *et seq.*), to decline to license otherwise economically feasible projects that threatened the environmental and recreational values of a river. *See Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954).

In summary, it is clear that the Commission has steadily become more aggressive in exercising its licensing authority to protect instream values and that, whatever the scope of state law preserved by section 27 may be with respect to conditioning consumptive use water rights to protect or promote instream values, Congress left no room for the imposition of such duplicative or conflicting

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[22] *FPC v. Union Elec. Co.*, 381 U.S. 90, 98 (1965). Although the Court also included irrigation and flood control in its comment, Industry Amici do not believe that Congress intended to vest licensing authority over irrigation uses in the Commission.

[23] In *Udall v. FPC*, 387 U.S. 428 (1967), this Court held that the Commission had a duty to explore "all issues relevant to the 'public interest', including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife". *Id.* at 450. *See also Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[24] *See, e.g., Southern California Edison Co.*, 8 F.P.C. 364, 373 (1949), and *Oakdale Irrigation District, et al.*, 10 F.P.C. 810, 814 (1951), involving projects in California.

conditions on the operation of licensed hydropower projects.

California suggests that *First Iowa* should be confined to pre-licensing situations and that section 27 intended state law to become effective after a license was issued and thereafter control the licensee's operations. Calif. Br. 42-43. This incredible suggestion has absolutely no basis in the Act, its legislative history, or the *First Iowa* decision. Indeed, it is difficult to imagine anything more in conflict with the fundamental purpose of the Act. It is inconceivable that Congress intended to permit a state, *after* the Commission has performed its required balancing functions (usually with state agency participation in comments and adjudicatory proceedings) and structured a license designed to carry out its determination as to the best comprehensive development of the affected resources, to impose water use restrictions on the operating of a project which could wholly alter, if not destroy, the economic feasibility of the project licensed by the Commission. Such a result would make a mockery of the exclusive licensing authority which Congress vested in the Commission. *First Iowa's* holding as to the exclusive authority of the Commission under the Act obviously must extend not only to the licensing of such projects but to their subsequent operation. The authority to impose appropriate conditions in a license is at the heart of the Act's regulatory scheme and must rest exclusively with the Commission if it is to be exercised effectively.[25]

Where Congress has considered it appropriate in certain special situations to allow an inroad on the Commission's exclusive licensing authority by other agencies,[26] such authority must be exercised either prior to the issuance of the license or project construction. California asks the Court to infer that Congress similarly authorized it to impose water use conditions on any water right permits issued to a licensee. But under California's "public trust doctrine" (page 19 *infra*) its conditioning authority might not stop at the licensing or construction stage and California would presumably claim the right to revisit any permit conditions during the term of the license. Such a power would be flatly inconsistent with one of the dominant purposes of the Act to provide assurance to developers that the terms and conditions of their licenses would not be changed without their concurrence. See *supra* pages 18-19.

Congress did not expressly provide such a concurrent conditioning role for the states, with all the possibilities that would pose for a state to frustrate or unduly burden the operations of those projects the Commission had found "best adapted" to develop the power and other "beneficial public uses" of a river basin, and the Court should not imply one from section 27.[27] Indeed, although Congress recently substantially enhanced the *advisory* role of the states with respect to license conditions affecting fish and wildlife, instream flows, and other environmental values in the Electric Consumers Protection Act of 1986 ("ECPA"),[28] it did so without adopting proposals of a western states' group that would have overturned *First Iowa* and granted the states dominant authority with respect to such conditions.[29] Consequently,

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[25] Similarly, California contends that the power to condition its water use permits is central to the effective exercise of its retained regulatory authority over water rights. Calif. Br. 46.

[26] *See* Brief of the Amici Council of State Governments, *et al.* at 24-25.

[27] In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), where the special conditioning authority of federal land management agencies under section 4(e) of the Act (16 U.S.C. § 797(e)) was recognized, the Court rejected the claim of the Indian Tribes that they should have the right to veto a proposed project by refusing to permit the use of their lands. *Id.* at 787. If Congress did not confer a veto power on Indian Tribes, to whom it owes a special fiduciary obligation as trustee, surely it did not intend to confer one on the states.

[28] 100 Stat. 1243, codified in scattered sections of 16 U.S.C.

[29] On April 17, 1986, during Senate consideration of ECPA, a resolution of the Western States Water Council ("WSWC") con-

reenactment of a major portion of the Act under those circumstances should be viewed as ratification of the *First Iowa* decision.[30] *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419-20 (1986).

B. Permitting States to Impose Minimum Flow or Other Water Use Conditions on Licensees Would Frustrate Two of the Fundamental Objectives of the Act.

A principal objective of the Act was to achieve "comprehensive" development of the water resources of a river basin for navigation, water power development, recreation and other beneficial uses. In the context of the times, Congress was attempting to overcome two principal obstacles. First, only a federal agency with broad, exclusive authority to consider and balance all of the interests associated with the *federal* land and navigable waters, which were the jurisdictional bases for the Act,

taining suggested "states' rights" amendments was inserted in the Congressional Record, but no amendments were offered upon agreement that the Senate Energy Committee would schedule a hearing on them. See 132 Cong. Rec. S4448-49 (daily ed.). A hearing was held on September 12, 1986. *Hearings on Hydroelectric Project Licensing/State Water Law Before the Senate Committee on Energy and Natural Resources*, 99th Cong., 2d Sess. (1986). The Executive Director of the WSWC testified and submitted proposed amendments which would have, *inter alia*, prohibited the Commission from (1) issuing any order with respect to a project unless the applicant had proven the acquisition of any rights necessary under state law to use water and (2) imposing license conditions inconsistent with water use conditions established under state law. *Id.* at 27-28.

The subsequent conference report of September 30, 1986 on the bill stated that it "does not change FERC's present responsibility to resolve competing demands in the public interest." H. Rep. No. 934, 99th Cong., 2d Sess. 25 (1986). ECPA became law on October 16, 1986, with none of the proposed WSWC amendments.

[30] The "savings clause" contained in section 17 of ECPA (100 Stat. 1259) and relied on by the Amici States to counter this ratification argument (States' Br. 18, n. 13) simply maintained the status quo with respect to existing federal-state jurisdiction over water rights, wherever *First Iowa* had already established it.

could accomplish that task. Individual states lacked authority to do so with respect to such federal interests, even with their own borders.

Second, interstate river basins presented an even more serious obstacle, since each basin state lacked authority to exercise comprehensive regulatory authority over resources located in another state absent an interstate compact creating an interstate agency with power to do so.[31] Thus, while optimum development of the hydroelectric resources of an interstate basin might dictate a single high dam at a particular location in that basin, the parochial interests of the individual states might lead to each state licensing one or more smaller dams in its own jurisdiction. Similarly, where a project spans an interstate boundary river, or is located just upstream of the point where a river crosses into another state or country, or dedicates all of its power for use in another state or states, in the absence of the Commission's comprehensive and exclusive licensing authority, a state could impose conditions on project operations designed solely to foster its own interests.

Centralizing the exclusive licensing authority in the Commission solved the foregoing two problems, but California's attempt to assert control over the conditions of water use by licensees would resurrect them both. If a particular flow standard is set for waters affecting fed-

[31] *First Iowa* emphasized the testimony of Secretary of Agriculture Houston that "[t]he problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies". 328 U.S. at 181, n. 23.

Industry Amici are aware of only two situations in which Congress has subordinated the comprehensive hydropower planning and licensing authority of the Commission to the States. In approving the Delaware and Susquehanna River Basin compacts, Congress provided that the Commission's licensing decisions "shall not substantially conflict" with the comprehensive plans of the compact agencies unless the President finds that the "national interest so requires." *See* Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 Nat. Res. Law. 153, 160-63 (1973).

eral Indian or other reservations under section 4(e), for example, under California's view the state conditions would nevertheless control. Similarly, the problems with California's proposal become even more pronounced in interstate river basins, where many licensed projects are located.[32] If the Commission determines that a certain flow is essential throughout a particular reach of an interstate river, it can implement that decision on an interstate basis as it licenses individual projects, in whatever state they are located. But if the California position were to become the law, each state could implement its water permit system to set its own flow requirements in disregard of the policies of its neighbor states.

A second major purpose of the Act was to provide the security of tenure for the use of federal lands and navigable waters essential to finance the projects needed for development of the Nation's hydropower resources. At the turn of the century, the right to occupy federal lands for the construction of a project was granted by either the Secretary of Agriculture or the Secretary of the Interior by annual special use permits revocable at will. This uncertain tenure situation was obviously inadequate to promote the necessary investment in hydroelectric projects. Against that background, the industry and the Executive Branch sought and obtained in the Act the opportunity to obtain licenses for up to 50 years, which was deemed adequate for necessary project financing.[33]

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[32] FERC, *Hydroelectric Power Resources of the United States—Developed and Undeveloped*, table 2 (GPO, 1988). The operations of over 100 hydroelectric projects, many in the interstate and international Columbia River Basin, are coordinated under the Pacific Northwest Coordination Agreement and Commission-imposed license conditions. *See* Brief of Amici Pacific Northwest Utilities.

[33] *See, e.g.*, the testimony of O. C. Merrill, principal Administration spokesman on the legislation:

> As to the present law, its chief lack and I do not intend to discuss it further, is the insecurity of tenure. I have not heard a man in the Government service or out defend that feature of the law. The one thing that is vital in new water-power legislation is the granting of a tenure under which investment can be protected. We could stop there and still do business under the present procedure of the departments.

Hearings before the House Committee on Public Lands on H.R. 14893, 63rd Cong., 2d Sess. 412 (1914). The result of this effort was section 6 of the Act, which provided for up to 50 year license terms and that all terms and conditions were to be expressed in the license, subject to alteration only upon notice and agreement. 16 U.S.C. § 799. *See Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983).

That vital security of tenure could be wholly undercut by California's proposed interpretation of section 27 to permit states to impose a variety of water use conditions on the operation of a project *after* it is licensed. Nowhere is this result better illustrated than in California, where the recent application of the "public trust" doctrine to vested appropriate water rights threatens to undermine, if not obliterate the security of tenure and investment which has long been the hallmark of the prior appropriation system of water rights.[34] In *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419, 658 P.2d 709 (1983), the California Supreme Court held that water permits granted by the State Water Resources Control Board are subject to the public trust doctrine and that the Board has the power and the duty to reconsider previous water allocations and associated conditions at any time. To permit California to wield such a regulatory Sword of Damocles over existing and prospective licensees could jeopardize existing investments and would plainly discourage future hydroelectric development (which may well be the undisclosed agenda of California and its environmental amici in this case.).

C. *California v. United States* Does Not Compel Reinterpretation of Section 27 to Preserve State Laws Governing the Use of Water for Hydroelectric Power Generation.

California contends that the interpretation of section 8 of the Reclamation Act of 1902 in *California* compels

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[34] *See, e.g.*, Gould, *The Public Trust Doctrine and Water Rights*, 34 Rocky Mt. Min. Law. Inst. 25-1 (1988).

a reinterpretation of section 27 to expand the kinds of laws *First Iowa* held it saved from supersedure. California's only justification for overturning a holding that has been applied in numerous judicial decisions, relied on by the Commission and the hydroelectric industry, and acquiesced in by Congress since then, indeed "ratified" by Congress in enacting ECPA in 1986 (*supra* pages 15-16), is that the language of the two sections is "virtually identical" and that there is nothing significantly different in the purposes of the Water Power Act and the Reclamation Act to justify different interpretations. These arguments are fallacious.

Section 27, although patterned after section 8, is *not* "virtually identical" to that section but embodies significant modifications of the earlier language. Section 27 provides:

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

In contrast, section 8 read as follows at the time section 27 was adopted (32 Stat. 390, bracketed numbers added):

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, [1] and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, [2] and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: [3] Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Obviously a major portion of section 8 was not carried over into section 27, which is undoubtedly why Rep. Mondell, the author of section 8, described section 27 only as "somewhat similar" to section 8. Calif. Br. 24.

The reasons for the numbered deletions from section 8 in adapting it to the different purposes of the Water Power Act can reasonably be inferred. In inverse order, clause 3 plainly was inappropriate because it focused on the Reclamation Act's primary goal of securing the consumptive use of water for irrigation, a subject not touched in the 1920 legislation. Rather, that latter Act established a new and pervasive federal regulatory regime primarily concerned with the use of water for hydroelectric power generation, with due regard for other competing interests.

Clause 2 was an attempt to maintain the status quo with respect to the respective jurisdictional authorities and proprietary rights of the federal government and the states in interstate streams, as well as to protect private use rights in such streams. This clause would have been inappropriate in section 27 because the whole thrust of the Act was to supersede state laws concerning the use of water for hydroelectric power generation, as well as other laws largely of a regulatory nature that relate to non-consumptive use of water affected by a licensed project.

Finally, the reason why clause 1 of section 8 was not carried over into section 27 so as to require either the Commission or its licensees "to proceed in conformity with" the state laws "saved" from supersedure under that section is obvious from the Act's broad purposes to promote the national development of hydropower. First, nothing in the Act purported to require a Commission license for the use of water for consumptive uses, so there was obviously no reason to direct compliance with such laws. Second, since there was no intent to preserve existing state authority over the use of water for hydroelectric power generation, there would be no applicable state laws for the licensee to comply with. Congress was

aware of the potential for duplicative state laws to frustrate or unduly burden the operations of those projects the Commission found "best adapted" to develop the hydropower and related resources and wisely precluded that possibility.

The foregoing reasons for the needed modification of section 8 highlight some of the basic differences in the two statutes. The Reclamation Act was designed for the development and consumptive use of water for relatively large scale irrigation projects. It was enacted against a backdrop of half a century of relatively small scale individual irrigation enterprise in the West under the innovative prior appropriation doctrine, with little involvement of the federal government other than to sanction local water laws and customs. *California*, 438 U.S. at 655-63. Western Congressmen and their farmer constituents, while eager to receive the federal investment in reclamation projects which would "make the desert bloom", were reluctant to do so at the price of the federal government overriding the basic elements of western water law that had provided the security of tenure in limited water supplies so essential in the arid West. Consequently, it is understandable why they fought to preserve those laws and directed the Secretary of the Interior to "proceed in conformity" with them in carrying out the new federal program.

The Federal Water Power Act was enacted against a wholly different backdrop. Hydroelectric power generation was a relatively recent development at the time the great debate began in 1914 over federal encouragement and regulation of that activity. Moreover, the federal government was already heavily involved in that development in that many projects were either located on federal land and required an occupancy permit from either the Secretaries of the Interior or Agriculture, or else involved navigable waters, thus requiring authorization from the Secretary of War and concurrent federal legislation. Hence, the centralization of the already dominant federal authority into the Federal Power Commission did

not produce the same degree of apprehension among western Congressmen that the Reclamation Act had, particularly since the federally licensed hydroelectric power generating activity would not involve the consumptive use of water. Consequently, the western Congressmen, despite all their rhetoric, obviously concluded that it was sufficient to preserve only existing state laws governing the consumptive use of water and all vested water rights.[35]

California's procrustean characterization of the scope and significance of the Act *vis a vis* the Reclamation Act (Calif. Br. 16) is patently wrong. It suggests that because reclamation projects are authorized and funded by Congress and operated by federal agencies, they somehow serve "important national goals", whereas licensed hydroelectric projects, which allegedly "are built and operated by private entities for profit purposes, . . . serve more local goals." *Id.* Aside from the questionable philosophy reflected in this argument, *i.e.* that the public interest can only be promoted through the direct involvement of the federal government, and the failure to acknowledge that a great proportion of the outstanding Commission licenses are held by cities, states (including California), other public agencies, irrigation districts and not-for-profit cooperatives, the comparison is woefully in error. Indeed, the hydroelectric project licensing program carried out by the Commission, which has licensed over 1000 projects in 48 states and has applications pending for many more, is far more a "national" program than the Reclamation Act, which, while having national benefits, is a predominantly "regional" program of some several hundred reclamation projects confined to the 17 western public land states.[36]

Furthermore, while there are many small licensed projects which make their own contribution to the national

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[35] *See* Brief of Amici Pacific Gas and Electric Company, *et al*, pt. II.

[36] U.S. Dep't of the Interior, Bureau of Reclamation, *1987 Summary Statistics*, Vol. 1 at 1 (1987).

interest,[37] such as Rock Creek's which California cites as an example of the allegedly "local" interests promoted by hydropower development, there are also many large licensed projects across the Nation.[38] Finally, although reclamation projects have matured from essentially local, single purpose irrigation projects to larger scale, multiple purpose projects, most remain discrete, totally intrastate, isolated projects with a dominant local irrigation purpose.[39] On the other hand, licensed hydroprojects, regardless of size, are usually interconnected to large regional,

[37] In the National Energy Act and the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§ 2601 *et seq.*), Congress enacted a comprehensive set of policies to encourage, among other goals, development of cogeneration and small power production and specifically, the "expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power". *Id.* at § 2601(3). *See* especially Title II, section 201 (*id.* at § 796(3)(17)-(22)) and Title IV.

[38] The largest privately-owned conventional hydropower project currently in operation is Susquehanna Power Company's Conowingo project on the Susquehanna River near Conowinga, Maryland, with 476.6 megawatts of generating capacity. The largest non-Federal publicly-owned conventional project is the Power Authority of the State of New York's Robert Moses project in Niagara Falls, New York, with 1,950 megawatts of capacity.

The largest privately-owned pumped storage project currrently in operation is the 2,100 megawatt Bath County project in Virginia owned by Virginia Power and Allegheny Power System. The largest publicly-owned pumped storage project is California Department of Water Resources' and Los Angeles Department of Water & Power's Castaic plant located off the California Aqueduct, with 1,200 megawatts of capacity. FERC, *Water Power—Use of a Renewable Resource* 7, 8 (May 1988).

[39] Indeed, overriding *interstate* problems associated with the Boulder Canyon Project Act of 1928 (43 U.S.C. §§ 617-617t), which not only is a supplement to the reclamation law but contains a "savings" provision similar to section 27 (*id.* at § 617q), led this Court to conclude that state law nevertheless could not limit the Secretary of the Interior's authority to allocate the water from that project, both interstate and intrastate, exclusively by federal contract. *Arizona v. California*, 373 U.S. 546, 585-90 (1963). *California* recognized that that decision turned in part of the project's "multistate scope" and did not disturb it. 438 U.S. at 673-74.

national or international transmission grids to provide power far beyond their generating sources.

D. Confirming the Commission's Exclusive Authority To Establish License Conditions Will Not Create Novel or Insurmountable Problems For State Administration of Water Rights.

California contends that reaffirming *First Iowa's* holding that the Act effected a preemption of state law in the field of regulating hydroelectric projects "would create two bodies of law in the same river—a body of FERC-created law applicable to hydropower projects and a body of state law applicable to all other users—thus causing potentially inconsistent regulation of water rights in the same river". Calif. Br. 44. It further alleges that "the state cannot effectively manage and coordinate water rights unless state laws apply to *all* users, including hydropower projects" (*id.* (emphasis added)) and that the Ninth Circuit decision would "create . . . 'legal confusion' ". *Id.* at 15. This is not true and, with all due respect, borders on the disingenuous. California cannot seriously argue, given the tension in federal-state relations in western water law since this Court's *Pelton Dam* decision in 1955 (*infra* pages 29-30), that a water right derived from federal law rather than state law is a unique, unmanageable concept. Indeed, it was a party to *Arizona v. California*, 373 U.S. 546 (1963), in which any lingering doubts as to the exercise of federally reserved water rights for Indian and other federal reservations were resolved adversely to the states' contentions.

There are several hundred million acres of federal lands throughout California and the other western states which have been reserved by Congress or the Executive Branch for a variety of special purposes and for which the United States claims federal reserved water rights. Most of those federal claims have already been adjudicated or are in the process of being adjudicated in stream adjudications under the broad consent to suit provisions of the 1952 McCarran Amendment, 43 U.S.C. § 666. *See Colorado River Water Cons. District v. United*

States, 424 U.S. 800 (1976); *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971); *United States v. District Court in and for Water Div. No. 5*, 401 U.S. 527 (1971). Under such adjudications the priority, permitted use and quantity of such federal rights are determined by state courts and administered under the resulting decree along with the state water rights on the stream. There is no apparent reason why the similar attributes of any water use by a hydroelectric project under a Commission license could not be similarly adjudicated and administered.

II. EVEN IF *FIRST IOWA* IS REINTERPRETED TO PERMIT NON-CONFLICTING STATE REGULATION OF HYDROELECTRIC POWER DEVELOPMENT, THE NINTH CIRCUIT RESULT MUST STILL BE AFFIRMED.

California concedes that, even if *California* justifies reinterpreting section 27 as broadly as it urges, "'state laws cannot be applied if they conflict with 'clear Congressional directives' ". Calif. Br. 14. It then contends that "states have the right to deny water rights for—in effect, to veto—[licensed] projects that fail to comply with state law, assuming that the state action does not conflict with a clear Congressional directive." *Id.* at 47. In short, even though *First Iowa* held that a state may not veto a hydro project subject to Commission jurisdiction by denying it a "license", California may veto it by denying it a "permit". But whatever label a state may place on the document it would require a project to obtain before it may use water for hydroelectric power generation, if section 27 did not save Iowa's law requiring a duplicative license from supersedure, it does not save California's law requiring a duplicative and conflicting permit. Moreover, if a state may not veto a jurisdictional hydroproject by denying it a license or permit, *a fortiori* it may not accomplish the same result by granting a permit containing burdensome conditions in conflict with the Commission license.

California's apparent assumption that concurrent state regulation is only superseded where it conflicts with "clear congressional directives" is also mistaken. That was the context for the traditional conflict preemption analysis in *California* because the federal reclamation program is implemented pursuant to the Reclamation Act and supplemental statutory authorizations for individual projects. But where a federal regulatory program is implemented through a licensing program, as here, the conflict inquiry extends to whether state law conflicts or is inconsistent with the license, lease, permit, contract, regulations or other indicia of authority issued by the federal agency.[40]

Moreover, it is the height of sophistry for California to suggest that the higher California flow requirements do not "conflict" with the license conditions because they "provide greater protection of the fish resource" and that the licensee "can meet its obligations under both federal and state requirements and is not required to choose between them."[41] Water that is required to bypass a proj-

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[40] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). In *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 n. 3 (9th Cir. 1979), *aff'd* 455 U.S. 947 (1980), the Court concluded that "the conflict in the present case strikes at the heart of the federal regulation [inasmuch as the] Mineral Lands Leasing Act and extensive permit procedures are designed for the very purpose of circumscribing the conditions under which the Government lessee will operate."

[41] Calif. Br. 48-49. The astounding position of the Amici American Rivers, *et al.* would have the federal-state jurisdictional issue resolved on a case-by-case basis, based not on the Supremacy Clause, but on which sovereign requires a licensee to release the most water for fish from a project! Among other things, these Amici apparently do not realize that the lesser of two water release schedules—not the greater—is sometimes the most environmentally desirable. *See e.g., Public Utility Dist. No. 1 of Grant County*, 45 F.E.R.C. ¶ 61,401 (1988), where the Commission approved a settlement agreement which, among other things, provided for a reduction in flows to discourage salmon spawning in areas which may not be covered by water during subsequent low flow periods.

ect's turbine generators for fish flows causes a gallon for gallon reduction in water available for the production of power,[42] and thus effects a change of water use by the project that the Commission had determined, pursuant to the direction to do so in section 10(a) of the Act, was "best adapted to a comprehensive plan for improving or developing a waterway or waterways" for the multiple purposes of the statute. 16 U.S.C. § 803(a). That duty, imposed exclusively on the Commission, is the "clear Congressional directive" California is unable to discover.

In the broader context of the conflict between California's flow conditions and the license conditions imposed by the Commission in its presently pending proceedings, the specific facts are undisputed. Rock Creek's license established interim minimum flow rates of 11 cubic feet per second (cfs) from May through September and 15 cfs from October through April while Rock Creek conducted required studies to provide the basis for Commission establishment of long term minimum flow rates. Rock Creek subsequently applied for and obtained in 1984 a state water permit setting interim flow rates at the same level and for the same duration as established by the Commission in its license. Three years later California unilaterally amended that permit to set long term rates at higher levels and for different durations than the interim rates provided for in the license, *i.e.*, 60 cfs from March through June and 30 cfs from July through February. The Commission subsequently conducted an adjudicatory hearing, in which California participated, on the issue of the appropriate long term minimum flow

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[42] In storage projects state requirements could require lowering reservoir levels below a minimum that the Commission considered appropriate for recreation, or conversely require higher reservoir levels for such recreation purposes even though the Commission had concluded that more reservoir space should remain available for flood control purposes. One of the most serious threats the California position poses is that there is no discernible limit to the mischief that state control of project water use could cause.

rates. On November 16, 1987 an administrative law judge issued a decision recommending long term rates of 20 cfs year round (41 F.E.R.C. ¶¶ 63,019, 65,122 (1987)), which is still pending before the Commission.

Based on the status of proceedings to that point, the Ninth Circuit correctly concluded that California's proposed conditions created an irreconcilable conflict with Rock Creek's license (877 F.2d 743, 749 (1989)):

> Changing the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project. It would, in essence, create a different type of hydropower project from the one described in the license. In effect, this does constitute a veto of the project that was approved and licensed by FERC.

Assuming that the Commission adopts the administrative law judge's recommendation, that direct conflict between the long term license conditions and the California conditions will still exist.

III. THE NINTH CIRCUIT CAN ALSO BE AFFIRMED ON THE ALTERNATIVE, INDEPENDENT GROUND THAT NO STATE LAWS PRESERVED UNDER SECTION 27 HAVE APPLICABILITY WHERE, AS HERE, FEDERALLY "RESERVED" LANDS ARE THE BASIS FOR COMMISSION JURISDICTION.

In *FPC v. Oregon*, 349 U.S. 435 (1955), this Court held that state water laws, regardless of the extent to which they otherwise may have been preserved under section 27 in non-public land states, have no applicability to a project when the basis for Commission jurisdiction rests in whole or part on the proposed location of the project on federal lands which have been "withdrawn" from disposition under the public land laws and "reserved" for power development purposes.

The Rock Creek project is located in part on federal lands managed by the Bureau of Land Management. Un-

der section 24 of the Act "any lands of the United States included in any proposed project . . . *shall* from the date of filing of application therefor be *reserved* from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress." 16 U.S.C. § 818 (emphasis added)). Consequently, that Congressionally mandated automatic reservation, as a matter of federal law and independent of any formal Commission action, impliedly "reserved" sufficient unappropriated water from Rock Creek to satisfy the reasonable requirements of the primary purposes of the reservation, *i.e.*, power production. *United States v. New Mexico*, 438 U.S. 696 (1978). Any license issued in such circumstances also impliedly carries with it the right to utilize such federal reserved water for the operation of the licensed project.[43]

The Ninth Circuit's decision can also be affirmed on this independent ground even though the issue was not decided below, *United States v. Arthur Young & Co.*, 465 U.S. 805, 815 n. 12 (1984), particularly since it appears to be within the scope of the issue on which review was granted, namely the applicability of state water law to the Rock Creek project. The bar against "post hoc rationalization" of an agency decision by agency counsel, *Bowen v. Georgetown Univ. Hosp.*, —— U.S. ——, 109 S.Ct. 468, 473-74 (1988), applies only to policy or judgment decisions entrusted to the agency and not to independent controlling legal grounds for affirmance. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

CONCLUSION

The Ninth Circuit's decision should be affirmed.

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[43] *Compare Skeem v. United States*, 273 Fed. 93 (9th Cir. 1921); Report of Special Master Simon H. Rifkind, p. 266 (December 5, 1960) adopted in *Arizona v. California*, 373 U.S. 546 (1963) (agricultural lessees of Indian lands entitled to a federally reserved water right may utilize such reserved right).

Respectfully submitted,

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